

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

COMMITTEE TO PRESERVE THE)	
RELIGIOUS RIGHT TO ORGANIZE and)	
HOBBY LOBBY STORES, INC.,)	
Petitioners, Cross-Respondent,)	Nos. 16-2297, 16-3162, 16-3271
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
Respondent, Cross-Petitioner.)	

MOTION OF HOBBY LOBBY STORES, INC. TO STAY APPEAL

Hobby Lobby Stores, Inc. (“Hobby Lobby”), by counsel, respectfully moves the Court to stay this consolidated appeal pending a decision by the United States Supreme Court in several cases that may control the outcome. Hobby Lobby states that Respondent-Cross-Petitioner National Labor Relations Board (“NLRB” or “Board”) does not oppose this motion. In support, Hobby Lobby states:

1. The primary issue in this appeal is whether a conditional and class action waiver contained in an employment arbitration agreement is enforceable under the National Labors Relations Act (“NLRA”), 29 U.S.C. §151 *et seq.*, and the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*

2. This question has been much disputed for the past five years. In 2012, a two-member panel of the National Labor Relations Board (“Board”) issued *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (“*D.R. Horton I*”) enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) (“*D.R. Horton II*”). In *D.R. Horton I*, the Board held for the first time that the NLRA prohibits employers from requiring “employees covered by the Act, as a condition of their employment, to sign an

agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.” *D.R. Horton I*, slip op. at 1. The Fifth Circuit refused to enforce the Board’s decision in relevant part. *D.R. Horton II*, 737 F.3d 344.

3. Following the NLRB’s issuance of *D.R. Horton I*, scores of federal and state courts have addressed the NLRB’s reasoning, typically in the context of enforcing employment arbitration agreements waiving class and collective action procedures. *See, e.g., Murphy Oil*, 361 NLRB No. 72 at 36 n.5 (Member Johnson, dissenting) (collecting citations to dozens of federal and state courts rejecting *D.R. Horton I*).

4. Recently, a circuit split has developed on this question. Although the Second, Fifth, and Eighth Circuits have rejected the Board’s *D.R. Horton I* decision¹, this Court and the Ninth Circuit have followed its conclusion, at least in part. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).

¹ *See Patterson v. Raymours Furniture Company, Inc.*, No. No. 15-2820-CV, 2016 WL 4598542, --- Fed. App’x ---- (2d Cir. Sept. 14, 2016); *RGIS, LLC v. NLRB*, No. 16-60129 (5th Cir. July 7, 2016) (per curiam); *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005 (5th Cir. June 27, 2016) (per curiam); *PJ Cheese, Inc. v. NLRB*, No. 15-60610 (5th Cir. June 16, 2016) (per curiam); *On Assignment Staffing Services, Inc. v. NLRB*, Case No. 15-60642 (5th Cir. June 6, 2016) (per curiam); *Chesapeake Energy Corp. v. N.L.R.B.*, 633 Fed. App’x 613, 2016 WL 573705 (5th Cir. Feb. 12, 2016) (per curiam); *Cellular Sales of Missouri, LLC v. N.L.R.B.*, 824 F.3d 772 (8th Cir. 2016); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) (“*Murphy Oil II*”); *D.R. Horton*, 737 F.3d 344; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

5. On January 13, 2017, the Supreme Court granted petitions for writs of certiorari in three cases involving these issues, including one challenging this Court's decision in *Lewis*. See *Epic Systems Corp. v. Lewis*, No. 16-285 (U.S.); *Ernst & Young v. Morris*, No. 16-300 (U.S.); *NLRB v. Murphy Oil USA, Inc.*, No. 16-307 (U.S.).

6. The Supreme Court's decision in these cases will resolve the primary issue in this appeal definitively.

7. To conserve the resources of the parties and the Court, Hobby Lobby respectively moves the Court to stay this appeal until the Supreme Court decides *Lewis*, *Morris*, and *Murphy Oil*.

8. Other Courts of Appeals have stayed appeals like this one pending the Supreme Court's decision. See, e.g., *Price-Simms, Inc. v. NLRB*, No. 15-1457 (D.C. Cir. Jan. 23, 2017) (ordering case removed from oral argument calendar and held in abeyance pending the Supreme Court's disposition of *Lewis*, *Morris*, and *Murphy Oil*); *Hoot Winc, LLC et al. v. NLRB*, No. 15-72839 (9th Cir. Jan. 17, 2017) ("Submission of this appeal is deferred pending resolution of *Ernst & Young, LLP v. Morris*, cert. granted, 2017 WL 125665 (U.S. Jan. 13, 2017), and further order of this court.")

9. The undersigned has conferred with counsel for the Board and for the Committee to Preserve the Religious Right to Organize ("Committee") and is authorized to state the Board does not oppose this motion.

10. Hobby Lobby understands the Committee does not consent to this stay because it would like this Court to decide whether an arbitration agreement containing a class action waiver is enforceable with respect to NLRA-covered employees when they are not covered by the FAA. However, the answer to that question also will likely to be resolved or affected by the Supreme Court's decision in the pending cases because, among other issues, the Supreme Court may find the NLRA simply provides no non-waivable right to access class action procedures irrespective of the FAA. Accordingly, it would be prudent and would conserve resources to stay this appeal in its entirety until the Supreme Court weighs in.

WHEREFORE, Hobby Lobby Stores, Inc. respectfully moves the Court to stay this consolidated appeal until the Supreme Court decides *Lewis, Morris*, and *Murphy Oil*.

Respectfully submitted

s/Christopher C. Murray

Ron Chapman, Jr.

Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.

8117 Preston Road, Suite 500

Dallas, TX 75225

Phone: 214-36-9216

Facsimile: 214-987-3927

ron.chapman@ogletreedeakins.com

Christopher C. Murray

Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.

111 Monument Circle, Suite 4600

Indianapolis, IN 46204

Phone: 317-916-1300

Facsimile: 317-916-9076

christopher.murray@ogletreedeakins.com

CERTIFICATE OF SERVICE

I hereby certify that on February 3rd, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that the foregoing document will be served via the CM/ECF system on the following counsel, who is a registered CM/ECF user.

Valerie L. Collins, Attorney
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

Linda Dreeben, Attorney
National Labor Relations Board
Office of the General Counsel
1015 Half Street, S.E., Room 8101
Washington, DC 20570-0000

Joseph F. Frankl, Attorney
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

Elizabeth A. Heaney, Attorney
National Labor Relations Board
Office of General Counsel
1015 Half Street, S.E.
Washington, DC 20570-0000

Yasmin Macariola, Attorney
National Labor Relations Board
Region 20, Suite 400
901 Market Street
San Francisco, CA 94103

David A. Rosenfeld, Esq.
Weinberg, Roger & Rosenfeld
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, CA 94501-6430

s/Christopher C. Murray
Christopher C. Murray
Ogletree, Deakins, Nash, Smoak & Stewart,
P.C.
111 Monument Circle, Suite 4600
Indianapolis, IN 46204
Phone: 317-916-1300
Facsimile: 317-916-9076
christopher.murray@ogletreedeakins.com

28565927.2